(1)

Supreme Court, U.S.
FILED

No. 99 1914 MAY 30 2000

In The OFFICE OF THE CLERK

SUPREME COURT OF THE UNITED STATES

TOWN OF NORWOOD, MASSACHUSETTS
Petitioner,

vs.

FEDERAL ENERGY REGULATORY COMMISSION
Respondent,

NEW ENGLAND POWER COMPANY
Intervenor.

Petition For Writ Of Certiorari To The
United States Court of Appeals For The First Circuit

PETITION FOR WRIT OF CERTIORARI

Charles F. Wheatley, Jr.
Counsel of Record
Wheatley & Ranquist
34 Defense Street
Annapolis, MD 21401
(301) 261-8608

Kenneth M. Barna
Alan Posner
Rubin and Rudman
50 Rowes Wharf
Boston, MA 02110
(617) 330-7081

164 pp

QUESTIONS PRESENTED

1. Whether the court of appeals erred in affirming an order of the Federal Energy Regulatory Commission for the imposition of a stranded cost charge relating to the Town of Norwood which conflict with the FERC's own Regulation governing imposition of stranded costs issued under Order 888 and the Energy Policy Act of 1992 governing wholesale open access and precluded the Town from being able to compete with the New England Power Company ("NEP") and its affiliate large distribution companies.

2. Whether the court of appeals erred in affirming the FERC's order approving stranded cost charges relating to Norwood, which exceeded FERC's authority under the Federal Power Act, precluding the Commission from awarding contract damages, created uncertainty as to the jurisdiction of the courts to award contract damages, and since not based on any review or evaluation as to whether there had been any breach of contract by NEP or Norwood, was arbitrary and capricious under Section 5 of the Administrative Procedure Act.

3. Whether the court of appeals, in approving the FERC's stranded cost order where the Power Contract between Norwood and NEP required Norwood to pay only for power delivered by NEP and did not include any authorization for unilateral imposition of liquidated damages by NEP, is in violation of this Court's *Mobile-Sierra* doctrine precluding any change by the Commission to agreed contract terms between the parties without meeting a public interest burden of proof which did not exist in the case.

4. Whether the court of appeals erred in affirming a retroactive application of NEP's stranded cost filing relating to Norwood at FERC after Norwood had terminated its existing

contract, contrary to this Court's decision in *Arkansas-Louisiana Gas Co. v. Hall*, and where NEP did not comply with the requirements of the FERC's Regulations governing new rate filings.

5. Whether the court of appeals erred in that part of FERC's order which refused to evaluate whether NEP's stranded cost filing relating to Norwood, which was twice as high as NP's agreed to CTC with its affiliates in competition with Norwood, was unduly discriminatory, in violation of Sections 212 and 205 of the Federal Power Act.

RULE 14(1)(b) STATEMENT

The petitioner is the Town of Norwood, Massachusetts. The Federal Energy Regulatory Commission is the respondent. The New England Power Company is an intervenor in the court of appeals below.

The case was consolidated at the court of appeals with another case involving different issues brought by the Northeast Center for Social Issue Studies, as petitioner and the Federal Energy Regulatory Commission, as respondent, involving a different part of the same orders of the Federal Energy Regulatory Commission.

RULE 29.6 STATEMENT

Under Rule 29.6, the Town of Norwood believes that New England Power Company, intervenor, is a corporation which is a subsidiary of the New England Electric System which also owns Massachusetts Electric Company and Narragansett Electric Co.

TABLE OF CONTENTS

Page No.

QUESTIONS PRESENTED i

RULE 14(1)(b) STATEMENT iii

RULE 29.6 STATEMENT iii

TABLE OF AUTHORITIES vi

OPINIONS BELOW 1

JURISDICTION 2

STATUTES AND REGULATIONS INVOLVED 2

STATEMENT OF THE CASE 2

Summary of the Case 2

REASONS FOR GRANTING THE WRIT 11

I. The Court Of Appeals Erred In Not Complying With The Commission's Regulations Governing The Imposition Of Stranded Costs, Upon Which Norwood

TABLE OF CONTENTS (CONT'D)

Page No.

Relied, Which Raises A Major Uncertainty As To The Administration Of Open Access Under Order 888 13

II. The Court of Appeals Decision Affirming NEP's CTC Is An Unlawful Award Of Contract Damages Over Which The Commission Has No Authority, And Will Unduly Disrupt And Complicate The Determination Of Breach Of Contract Damages In The Courts Contrary To This Court's *Montana-Dakota Utilities* Decision 17

III. The Court Of Appeals Erred In Not Rejecting NEP's Stranded Cost Filing (CTC) Relating To Norwood As Conflicting With This Court's Long-Established *Mobile-Sierra* Doctrine 18

IV. NEP's CTC Should Have Been Rejected As An Unlawful Retroactive Rate Under This Court's Decision In *Arkansas-Louisiana Gas Co. v. Hall* And For Failing To Meet FERC Regulations For New Rate Filings 21

V. The Court of Appeals Erred in Sustaining The FERC's Orders Refusing to Address The Merits of Holding a Hearing On Norwood's Claims that NEP's CTC Relating to Norwood and NEP's Denial of Standard Offer Wholesale Service Constituted Undue Discrimination In Violation of Sections 212 and 205(b) of the Federal Power Act 24

CONCLUSION 28

TABLE OF AUTHORITIES

Page No.

JUDICIAL CASES:

Arkansas-Louisiana Gas Co v. Hall,
453 U.S. 571 (1981) 10, 21, 22

Atchinson, Topeka & Santa Fe Railway Co. v. Wichita Board of Trade, 412 U.S. 800 (1973) 16

California v. FPC, 369 U.S. 482 (1962) 2

Cities of Bethany, et al. v. FERC,
727 F.2d 1131 (D.C. Cir. 1984),
cert denied, 469 U.S. 915 26

Columbia Gas Transmission Corp. v. FERC,
831 F.2d 1135 (D.C. Cir. 1987) 22

Distrigas of Massachusetts v. FERC,
737 F.2d 1208 (1984) 16

Electrical District No. 1 v. FERC,
774 F.2d 490 (D.C. Cir. 1985) 22

FPC v. Sierra Pacific Power Corp.,
350 U.S. 348 (1956) 3, 10, 17, 20

FPC v. Sunray DX Oil Co.,
391 U.S. 9 (1968) 10, 22

TABLE OF AUTHORITIES (CONT'D)

Page No.

Northeast Utilities Service Co. v. FERC,
993 F.2d 937 1st Cir. 1993) 2

Otter Tail Power Co v. United States,
410 U.S. 366 (1973) 2

Southern California Edison Co. v. FERC,
696 F.2d 43, 46-47 (D.C. Cir. 1982) 24

Town of Concord v. FERC, 955 F.2d
67, 71 (D.C. Cir. 1991) 22

United Gas Pipe Line Co.
v. Mobile Gas Service Corp.,
345 U.S. 22 (1956) 3, 10, 17, 20

ADMINISTRATIVE DECISIONS:

Consumer Power Co., 47 FERC ¶61,283
(1988), *reh'g denied*, 48 FERC
¶61,113 (1989) 24

New England Power Company,
81 FERC ¶61,281, *order denying*
reh'g, 83 FERC ¶61,265 (19) 14

Southern California Edison Co.,
85 FERC ¶61,023 (1998) 3, 9

TABLE OF AUTHORITIES (CONT'D)

Page No.

STATUTES AND REGULATIONS:

Administrative Procedure Act,
5 U.S.C. §706(2)(A) 18

Federal Power Act, §201, 16 U.S.C. §824b 3

Federal Power Act, §205,
16 U.S.C. §824d 5, 7, 11, 12

Federal Power Act, §212,
16 U.S.C. §824b 5, 7, 11, 12

FERC Order No. 888, *et seq.*
Promoting Wholesale Competition Through Open Access Non-discriminatory Transmission Services by Public Utilities; Recovery of Stranded Costs by Public Utilities and Transmitting Utilities, Order 888, 61 Fed. Reg. 21,540 (May 10, 1996) FERC Stats. & Regs. ¶ 31,036 (1996), *order on reh'g*, Order No. 888-A. 62 Fed. Reg. 12,274 (March 14, 1997), FERC Stats & Regs., ¶ 31,048 (1997), *order on reh'g*, Order No. 888-B, 81 FERC ¶ 61,248 (1997), *order on reh'g*, Order No. 888-C, 82 FERC ¶ 61,046 (1998), *petition for review filed sub nom., Transmission Access Policy Group v. FERC*, Case Nos. 97-1715, *et al.* (D.C. Cir.) ..... *passim*

TABLE OF AUTHORITIES (CONT'D)

Page No.

18 C.F.R. §26 ..... 13, 14

18 C.F.R. §35.13 24

No. _____

In The

SUPREME COURT OF THE UNITED STATES

TOWN OF NORWOOD, MASSACHUSETTS
Petitioner,

vs.

FEDERAL ENERGY REGULATORY COMMISSION
Respondent,

NEW ENGLAND POWER COMPANY
Intervenor.

PETITION FOR WRIT OF CERTIORARI

OPINIONS BELOW

The opinion of the United States Court of Appeals for the First Circuit, App.1a-27a is reported at 202 F.3d 392 (1st Cir. 2000). The order of the United States Court of Appeals for the First Circuit denying the "petition for panel rehearing" by the Town of Norwood was entered on March 1, 2000, App. 119.

The opinions of the Federal Energy Regulatory Commission (App. 28a-119a) are reported at 81 FERC ¶61,281 (November 26, 1997); 82 FERC ¶61,179 (February 25, 1998); 83 FERC ¶61,174 (May 15, 1998); 83 FERC ¶61,265 (June 3, 1998); 83 FERC ¶61,275 (June 10, 1998); and 84 FERC ¶61,175 (August 5, 1998).

JURISDICTION

The judgment of the court of appeals was entered on February 2, 2000. A petition for panel rehearing by Norwood was denied on March 1, 2000. This Court's jurisdiction is invoked under 28 U.S. C. § 1254(1). The court of appeals had jurisdiction to review orders of the Federal Energy Regulatory Commission issued under the Federal Power Act under Section 313(b) of the Federal Power Act, 16 U.S.C. § 825*l*(b).

STATUTES AND REGULATIONS INVOLVED

The pertinent statutes for this petition for review are Sections 205, 212, and 313(b) of the Federal Power Act, 16 U.S.C. § 824d, 824k and 825*l*(b) and Section 5 of the Administrative Procedure Act, 5 U.S.C. § 706(2)(a), App. 7a. The pertinent regulations are 18 C.F.R. § 35.26, and 18 C.F.R. § 35.13. Copies of these statutes and regulations are appended to this brief, App. 119a-125a.

STATEMENT OF THE CASE

This petition involved three separate cases filed by NEP in 1997-1998 at the FERC, which is vested with regulatory jurisdiction under the Federal Power Act ("FPA") over wholesale sales of electric power in interstate commerce. [1]

---

[1] The FERC has no jurisdiction to adjudicate the Federal Antitrust Laws. *Otter Tail Power Co. v. United States*, 410 U.S. 366 (1973); *California v. FPC*, 369 U.S. 482 (1962); *Northeast Utilities Service Co. v. FERC*, 993 F.2d 937, 947-948 (1948) (1st Cir. 1993).

(Footnote 1 continued on next page)

Prior to the events of this case, NEP was the largest provider of low-cost requirements wholesale electric power in New England, which then served its own large distribution company affiliates, including Massachusetts Electric Company ("Mass. Electric") and Narragansett Electric Company ("Narragansett"), constituting over 97 percent of its total sales, at rates set by the FERC under the just and reasonable standard of Sections 212 and 205 of the FPA, 16 U.S.C. §§ 824a and 824d, on a cost-of-service basis.

Norwood had gained access to this Tariff 1 service pursuant to an antitrust Decree and Order of April 12, 1983 in the Federal District Court, MA, and was receiving its requirements wholesale power at the same cost-of-service regulated rates as NEP provided to its own large affiliates, Mass. Electric and Narragansett, who competed with Norwood for customers in the same retail market areas.

On September 30, 1996, NEP voluntarily negotiated a plan (from which Norwood was excluded) not required by Federal law or regulations, to divest itself of its power supply facilities,[2] terminate the historic cost-of-service regulation by

---

(Footnote 1 cont'd)

The FERC also does not have exclusive jurisdiction over breach of contract cases adjudicated in federal and state courts. *FPC v. Sierra Pacific Power Corp.*, 350 U.S. 348 (1956) and *United Gas Pipe Line Co. v. Mobile Gas Service Corp.*, 350 U.S. 332 (1956); *Southern California Edison Co.*, 85 FERC ¶61,023 (1998).

[2] Section 201 of the FPA provides that:

(Footnote 2 continued on next page)

the FERC over such power to NEP's large distribution company affiliates under NEP's Tariff 1, and to obtain unregulated market-based pricing. This plan was contingent on NEP's collection of up to $7.6 billion in stranded costs under the FERC's Order No. 888,[3] and the setting of agreed-to fixed low "standard offer" prices to NEP's affiliates for up to 12 years, designed to give its affiliates an anticompetitive advantage to retain retail customers against other competitors in New England during an initial four years, followed by a rapid escalation of the fixed standard offer prices in the future, to upwardly bias future market prices in New England.

In the first case before the FERC, NEP filed at the FERC its divestiture agreement containing terms subjecting Norwood to the payment of an unascertained portion of the $7.6 billion in stranded costs. Norwood intervened objecting, *inter alia*, that this was contrary to the express provision of the Commission's Regulations under Order 888, excluding Norwood, as not being a transmission customer of NEP, from

---

(Footnote 2 cont'd)

> The provisions of this subchapter shall apply to the transmission of electric energy and interstate commerce and to the sale of electric energy at wholesale in interstate commerce. . .but [FERC] shall not have jurisdiction, except as specifically provided . . . over facilities used for the generation of electric energy....

16 U.S.C. §824(b).

[3] Promoting Wholesale Competition Through Open Access Nondiscriminatory Transmission Services By Public Utilities; Recovery of Stranded Costs by Public Utilities and Transmitting Utilities, FERC Regulations Preambles §31,036 (1991-1996); FERC Regulations §13,976 (1997).

any stranded costs.

Norwood also voluntarily [4] presented expert testimony demonstrating that the stranded costs were excessive, and did not comply with Order 888, and that the standard offer fixed prices were discriminatory against Norwood in violation of Order 888 and Sections 212(a) and 205(b) of the FPA, 16 U.S.C. §§824k(a) and 824d(b), and, accordingly, requested a hearing. The Commission did not consider Norwood's claims or evidence and denied any hearing in its brief letter order approving the agreement, but required that it be amended to preclude any applicability of the stranded costs to Norwood. App. 36a; 81 FERC ¶61,281, 62,371 (1997).

In the second case, NEP filed under Section 203 of the FPA for approval of its sale of limited facilities relating to its regulated sale of all of its non-nuclear power generation business to U.S. Generation Co. NE, a subsidiary of Pacific Gas & Electric Co. ("USGen/PG&E"); for deregulated rates and termination of Tariff 1 service to its affiliates; for fixed standard offer wholesale prices for its affiliates; and for conversion of Norwood's prior cost-of-service rate under Tariff 1 to a fixed rate contract over 20 percent higher than the wholesale rates available to its affiliates.[5] Norwood again intervened raising objections under Order 888 and the FPA and again voluntarily presented expert testimony as to the discriminatory impact of

---

[4] No dates for submittal of such testimony were ever required of any party, because NEP urged immediate approval of its "settlement."

[5] Norwood's frozen rate resulted in a rate twenty percent higher than NEP's affiliates; NEP low standard offer fixed rate to its affiliates not available to Norwood, resulted in thirty percent higher rates for Norwood; and NEP's CTC on Norwood resulting in Norwood paying forty percent higher rates.

NEP's divestiture plan on Norwood.

The FERC, in an order issued February 25, 1998, approved NEP's termination of its cost-of-service Tariff 1 service to its affiliates, and the fixed prices for standard offer wholesale power, admittedly not based on any regulated cost of service, but accepted as "market base prices" without any analysis or hearing of Norwood's tendered expert evidence. FERC granted NEP's request that Norwood's Power Contract with NEP for regulated cost-of-service under Tariff 1 be converted to a fixed price contract for the future and precluded Norwood from the fixed below-market standard offer prices available only to NEP's affiliates. App. 85a; 83 FERC ¶61,275 (1998). This resulted in wholesale rates to Norwood 30 percent higher than those charged by NEP to its affiliates, and threatened the viability of Norwood's municipal electric system. Again, Norwood was denied any hearing or adjudication of the merits of its objections to NEP's divestiture plan.

Because of the adverse impacts of NEP's actions on Norwood and its duty to mitigate damages in its then pending complaint for breach of the contract and violations of the Federal antitrust laws (filed on April 14, 1997), Norwood entered into a power contract with an alternate supplier at market-based rates, which the FERC accepted on April 22, 1998 as Norwood's new filed rates effective April 1, 1998, which NEP never appealed. NEP, after Norwood had already terminated its contract, made a third unilateral filing at FERC to impose stranded cost payments (called "contract termination charges" ("CTC")) on Norwood which were twice as high as the stranded cost charges NEP had agreed to with its affiliates in the September 30, 1996 Agreement. NEP's new CTC relating to Norwood amounted to a charge to Norwood of $78 million for no power delivered by NEP over a ten-year period.

Norwood presented detailed expert testimony and exhibits to the FERC in support of its objections to NEP's filing for stranded costs against Norwood, showing that it would result in Norwood paying over 40 percent higher wholesale rates for electric power over those required by NEP from its distribution company affiliates, Mass. Electric and Narragansett. In orders issued May 15, 1998, and August 5, 1998, the FERC approved NEP's stranded cost filing applicable to Norwood without any analysis or hearing of Norwood's expert evidence that it directly conflicted with the FERC's regulations under Order 888 and other long-standing FERC precedents, and that it discriminated in violation of the FPA, Sections 212 and 205(b) against Norwood in favor of NEP's affiliates. App. 103a, 112a; 16 U.S.C. §§824k and 824d(b). App. 119a, 120a; 83 FERC ¶61,174 (1998); 84 FERC ¶61,175 (1999).

The court of appeals in its decision of February 2, 2000 affirmed the FERC's orders. App. 9a; 202 F.3d, 392 *et seq.*

The court of appeals agreed with Norwood that the Commission's regulations governing the imposition of stranded costs under Order 888 and the Energy Policy Act of 1992 governing wholesale open access, barred NEP from any stranded cost, because Norwood, by virtue of its antitrust litigation culminating in the 1983 Decree and Order, had already obtained open access over Boston Edison's transmission system, and was not a transmission customer of NEP. The regulations in Order 888 explicitly allowed stranded costs only where a departing customer had previously taken transmission service from the utility claiming stranded costs. This completely distinguished Norwood from NEP's affiliates, Mass. Electric and Narragansett, which had been expressly structured through corporation organization from the beginning to obtain their transmission services from NEP, which would provide wholesale transmission and power service to them solely under

FERC regulation to avoid any state regulation over such services.

The court of appeals, however, ruled that, "while Order No. 888 does not mandate the new tariff, neither does it forbid it." App. 10a; 202 F.3d at 399. The court did admit that both it and FERC considered NEP's CTC charge to be one "for stranded cost recovery in the present case." *Id.* Neither the court, nor FERC, identified the legal basis and rationale for such a charge and why the express language of the Commission's regulations authorizing a stranded cost only under the terms of that regulation did not bar such an alternate procedure.

The court also conceded that Norwood would not be subject to the imposition of any stranded costs because the regulations "excluded from stranded cost recovery those cases where a requirements contract was entered into or extended after July 11, 1994." App. 10a; 202 F.3d at 399. Norwood had entered such a contract revision with NEP after July 11, 1999, and NEP never sought to insert a clause authorizing it to charge stranded costs. Admitting this to be true, the court continued to uphold the Commission's approval of the CTC to Norwood on the ground that "the restrictions in Order No. 888 are no more than conditions on stranded cost recovery *under that order* and do not preclude the Commission from allowing tariffs that permit somewhat similar recovery whenever a customer departs an existing contractual application." *Id.*

The court of appeals next rejected Norwood's claim that NEP's CTC relating to Norwood was an improper attempt by FERC to adjudicate breach of contract damages which it had no authority to do under the FPA, and improperly impinge on the jurisdiction of the courts to determine such issues. The court of appeals conceded that:

> Admittedly, the stranded cost recovery in the tariff is closely akin to contract damages, and the commission in the past has declined to adjudicate some contract disputes. *E.g.*, *Southern Cal. Edison Co.*, 85 FERC ¶61,023 (1998).

App. 11a; 202 F.3d at 400. The court admitted that

> Here, the Commission has not interpreted Norwood's contract with New England Power or determined whether Norwood has breached the contract or has been freed from the contract based on a breach by New England Power . . . It merely upheld, on a generic basis, a termination charge for those customers who are bound by existing contracts but wish to avoid their obligations.

Id." But neither the court nor FERC explained how the Commission could determine the appropriate level of damages to be paid by either party without evaluating the issues as to whether Norwood or NEP has breached the contract, and if so what is the appropriate level of damages that a court would adjudicate under such circumstances, and how, in the absence of such an evaluation, its determination of a fixed payment by Norwood of $78 million over ten years does not interfere with the admitted jurisdiction of the courts to determine breach of contract and damages therefor.

The court of appeals then ruled that this Court's decisions under the *Mobile-Sierra* doctrine [6] "prevents FERC from overriding a contract unless it finds that the contract is contrary to the public interest." *Id.* Despite the fact that Norwood's Power Contract with NEP expressly authorized Norwood to pay NEP only for power delivered to it, required service under Tariff 1, a cost-of-service rate, and precluded any unilateral change by NEP under its tariff that conflicted with the Contract, the court affirmed the FERC's acceptance of NEP's stranded cost charge relating to Norwood.

The court of appeals ruled that NEP's CTC against Norwood did not violate the *Mobile-Sierra* doctrine, but simply gave Norwood an option "to terminate earlier (at a specified price)" . . . which "is certainly a detriment, but absent a showing that its formula is any worse than contract damages, it merely spells out what would have been the law's remedy if Norwood had no option but simply breached the existing contract." *Id.* Nowhere did the Commission or the court demonstrate that the CTC did not conflict with Norwood's Power Contract under the *Mobile-Sierra* test, or that it met the heightened public interest test required for authorization of such a contract change.

The court of appeals ruled that NEP's filing of its stranded cost charge after Norwood had given it notice of termination was not a retroactive ratemaking under this Court's precedents in *Arkansas-Louisiana Gas Co. v. Hall*, and *Federal Power Comm'n v. Sunray DX Oil Co.*. The court reached this result by ruling that the CTC is not collecting prior costs allegedly incurred by NEP before its divestiture of its facilities,

---

[6] *United Gas Pipe Line Co. v. Mobile Gas Serv. Corp.*, 350 U.S. 332, 344 (1956); *Federal Power Comm'n v. Sierra Pac. Power Co.*, 350 U.S. 348, 354-55 (1956).

but "would only govern Norwood as to its future purchases – or failures to purchase – from New England Power." App. 21a; 202 F.3d at 401.

Inconsistently, the court ruled that NEP was not required to follow the Commission's regulations relating to rates to govern future charges because:

> . . .The termination charge is not a new or increased rate for supplying energy. It is a formula-driven charge to recover certain projected losses to New England Power caused by *not* supplying electricity after preparing to do so, calculated based on rates already approved by FERC [and that] the contract termination charge in no way represents a rate increase for Norwood.

Id.

The court of appeals affirmed FERC's orders imposing a CTC on Norwood which its experts had demonstrated was twice as high as the CTC set by NEP for its own affiliates in competition with Norwood, and which denied Norwood any of the below market standard offer service for wholesale power as not constituting undue discrimination under Section 212 of the FPA, as amended by the Energy Policy Act of 1992 and Section 205(b) of the FPA, 16 U.S.C. §§ 824k(a), 824d(b). The court ruled that such an undue preference was permissible where NEP had settled on its rates with its affiliates, by disregarding the holdings of the applicable cases that, only where an administrative hearing had been granted to the contesting party with an opportunity to litigate the proper rate, is such treatment permissible. In all three of the cases below, Norwood had

timely requested a hearing and had voluntarily filed affidavits of expert witnesses (despite no hearing procedures having been set at any time for such testimony) demonstrating genuine issues of fact as to the discriminatory treatment provided NEP's affiliates *vis a vis* Norwood. [7]

The court of appeals ruled that Norwood's exclusion from equal wholesale rates based on equal CTC payments and equal access to standard offer service was justified because, under Massachusetts law, "NEP has no obligation to offer retail standard offer rates as a backup for its retail customers." App. 18a; 202 F.3d at 403. This, however, was shown by Norwood's expert evidence to be irrelevant, where the issue is one of nondiscriminatory wholesale power rates subject to the exclusive jurisdiction of FERC under Sections 212 and 205(b) of the FPA, 16 U.S.C. §§ 824k(a) and 824d.

The court of appeals admitted that Norwood had duly requested a hearing with respect to the unilateral imposition by NEP of its CTC charge on Norwood, which Norwood's experts' affidavits demonstrated was twice as high as the CTC to which NEP and its affiliates had agreed. The Commission itself had made no attempt to evaluate Norwood's affidavits to resolve the disputed issues of fact involved, and never ordered any discovery or hearing procedures under the FPA. Norwood's claim that this violated its rights under the FPA was rejected by the court of appeals which acted as though

---

[7] The court of appeals' reference to one interim ruling by an administrative law judge in the first proceeding, App. 16a; 202 F.3d at 402 is not in point. There, the judge had set no schedule for presenting prepared testimony, and his ruling was clearly mooted by subsequent events where Norwood, based on new contracts entered by NEP with USGen NE, appropriately filed expert testimony and exhibits supporting its position under the FERC's rules, which was accepted by FERC.

Norwood had had a full hearing and adjudication of the matter. Since Norwood's experts had delineated the substance of the claims, the issue was whether those disputed issues of fact required an adjudication on the merits by the Commission, which the court admits Norwood never received. *Id* at 404.

REASONS FOR GRANTING THE WRIT

I. The Court Of Appeals Erred In Not Requiring FERC To Comply With Its Own Regulations Governing The Imposition Of Stranded Costs, Upon Which Norwood Relied, Which Raises A Major Uncertainty As To The Administration Of Open Access Under Order 888

The Commission's regulations relating to stranded costs are clear and unambiguous:

> **Section 35.26 Recovery of Stranded Costs By Public Utilities And Transmitting Utilities**
>
> I. *Purpose.* --
>
> This section establishes the standards that a public utility or transmitting utility must satisfy in order to recover stranded costs.
>
> II. *Definitions.* –
>
> Wholesale stranded costs means any legitimate, prudent and verifiable cost incurred by a public utility or a transmitting utility to provide service

to:

> (i) A wholesale requirements customer that subsequently becomes, in whole or in part, an unbundled wholesale transmission service company of such public utility or transmitting utility.

18 C.F.R. § 35.26; emphasis added.

NEP's stranded cost filing relating to Norwood should have been rejected because it did not meet this requirement. Norwood has not been and will not subsequently become, in whole or in part, "an unbundled wholesale transmission service company" of NEP. The Decree and Order of the U.S. District Court issued April 12, 1983, *supra 3*, expressly approved a Settlement Agreement specifying that Norwood was a "transmission customer" of Boston Edison Company and would remain such a transmission customer responsible to pay Edison's transmission rates for the future.

Both the court of appeals and the FERC conceded that the Commission's regulations do not allow any stranded costs to be applied to Norwood. App. 8a-10a; 202 F.3d at 399. The Commission, in Order 888, expressly rejected any application of stranded costs in a situation like Norwood's:

> . . .We will retain the definition of "wholesale stranded costs" proposed in the Supplemental Stranded Cost NOPR. We believe it would be inappropriate to expand the definition to include the situation where a wholesale requirements customer (or a retail-turned-wholesale customer) ceases to purchase power from a utility without using the transmission services of

> that utility. Any costs that the utility might incur as a result of the requirements customer in this scenario would be outside the scope of this Rule. . . .

Order 888, FERC Regulations Preambles ¶31,036 at 31, 849 (1991-1996). *See also*, Order 888-A, FERC Regulations Preambles ¶31,048 at 30,348 (1997).

The court of appeals decision that the restrictions in the regulations "are no more than conditions on stranded cost recovery *under that order* . . ." (App. 10a-11a; 202 F.3d at 399) flies in the face of the plain language of the regulation that "this section establishes the standards that a public utility or transmitting utility must satisfy in order to recover stranded costs." The Commission has no other regulation governing the collection of stranded costs other than Order 888 relating to that subject. Furthermore, the court of appeals admits that the CTC filing by NEP against Norwood in this case is "for stranded cost recovery in the present case . . ." Id; emphasis added. Similarly, the Commission in its orders approving a CTC for NEP's affiliates, Mass. Electric and Narragansett (which, unlike Norwood, are transmission customers of NEP) involve the imposition of stranded costs under Order 888. *New England Power Co.*, App. 28a; 81 FERC ¶61,281, 62,371; *order denying rehearing*, App. 34a; 83 FERC ¶61,265, 62,104 ("... the Settlement Agreements would amend Mass. Electric's and Narragansett's service agreements under Tariff 1 to . . . require the affiliated customers to pay NEPCO what is know as a Contract Termination Charge (CTC) which is designed to recover stranded costs associated with, *inter alia*, NEPCO's investment in generating assets, contractual commitments for purchase power and fuel transportation, deferred costs and other regulatory assets, plus a return on unrecovered costs.")); emphasis added. NEP's filing of its CTC as to Norwood also

stated it was designed to allow "NEP's recovery of any stranded costs consistent with the contract modifications."

Furthermore, the court of appeals agreed that Norwood, even if it were a transmission customer of NEP, would not have been subject to the imposition of any stranded costs under the Commission's regulations because the Power Contract between NEP and Norwood was extensively amended after July 11, 1994 and, at that time, NEP never inserted any condition for the collection of stranded costs, as required by the Commission's regulations. App. 10a-11a; 202 F.3d at 399. Here again, the court construed the Commission's regulations only as relating to "stranded cost recovery under that order [Order 888]." *Id.*

But nowhere does the court cite any other rule, regulation or legal authority authorizing the Commission to impose stranded costs under any conditions, much less the facts of the present case. In this regard, there is no precedent, regulation or law in support of such a charge and, therefore, it is unclear how the charge's lawfulness can be sustained. *See, e.g, Atchinson, Topeka & Santa Fe Railway Co. v. Wichita Board of Trade*, 412 U.S. 800, 806 (1973); *Distrigas of Massachusetts Corp. v. FERC*, 773 F.2d 1208, 1210-11 (1st Cir. 1984).

The court of appeals decision raises great uncertainty as to what constitutes stranded costs governing the actions of parties under the open access regime ordered under Order 888. The court's ruling that the Commission's stranded cost Regulations in Section 35.26 which "establishes the standards that a public utility or transmitting utility must satisfy in order to recover stranded costs" do not apply raises a great cloud of uncertainty over this key matter which will impair decisions relating to open access. Review of these matters warrants granting the writ.

II. The Court of Appeals Decision Affirming NEP's CTC Is An Unlawful Award Of Contract Damages Over Which FERC Has No Authority, And Will Unduly Disrupt And Complicate The Determination Of Breach Of Contract Damages In The Courts

The court of appeals held that issues of breach of contract and the damages therefor have been confirmed in this case to be within the jurisdiction of the courts. App 11a; 202 F.3d at 400. However, the court's inconsistent approval of NEP's CTC relating to Norwood establishes an irreconcilable conflict with the jurisdiction of those courts to adjudicate the cases before them.

The court appears to agree that FERC has no legal authority to determine damages for a breach of contract. Nothing in the FPA grants any such authority to the Commission and its exercise would be inconsistent with the principles of the *Mobile-Sierra* doctrine, *infra* at 18-21, requiring that the contract agreement between the parties is binding on the Commission in the absence of some overriding public interest showing, which admittedly FERC has not done in the present case.

The problem arises because the CTC is essentially indistinguishable from contract damages. Since the court concedes that NEP's CTC relating to Norwood has the appearance of contract damages, this poses the issue as to whether it governs the courts in resolving the breach of contract issues within their sole jurisdiction. If so, the CTC clearly exceeds FERC's jurisdiction under the FPA. If it does not bind the courts, as the court of appeals opinion appears to infer, this important issue of which jurisdiction has controlling power to

adjudicate contract damages which need to be resolved in the interest of determining the proper jurisdiction of the courts *vis a vis* FERC.

In raising, but not resolving this issue, the court of appeals has demonstrated a fatal deficiency in the Commission's order approving NEP's CTC relating to Norwood. The court holds that FERC:

> . . . has not interpreted Norwood's contract with New England Power or determined whether Norwood has breached the contract or has been freed from the contract based on a breach by New England Power.

App. 11a; 202 F.3d at 400. Without such a determination, the setting of amounts to be paid under the contract by the CTC exceeds the Commission's authority under Sections 205 or 212 of the FPA because it does not meet the requirements of Section 5 of the Administrative Procedure Act precluding arbitrary and capricious adjudication. App. 125a; 5 U.S.C. §706(2)(A).

The CTC cannot be based on reasoned decisionmaking when the FERC admitted it has made no review or analysis of the contract issues relating to the contract involved.

III. The Court Of Appeals Erred In Not Rejecting NEP's Stranded Cost Filing (CTC) Relating To Norwood As Conflicting With This Court's Long-Established *Mobile-Sierra* Doctrine

The FERC, in its order of February 25, 1998, App. 44a; 82 FERC ¶61,179, 61,660 (1998) approved NEP's divestiture

to USGen/PG&E of its jurisdictional power facilities (which did not include its generator), and its termination of Tariff 1 service to its distribution affiliates [8] and, at NEP's request, converted Norwood's service under its Power Contract from a cost-of-service based rate to fixed-rate contract. NEP subsequently filed its stranded cost CTC relating to Norwood, which the Commission approved in an order issued May 15, 1998. App. 103a; 83 FERC ¶61,174, (1998). Both of these orders conflicted with the Power Contract between Norwood and NEP approved by the antitrust Decree and Order of April 12, 1983.

Article 1 of the Power Contract provided that: "Under the terms and conditions specified in this Contract, NEP agrees to provide all-requirements electric service to Norwood under NEP's FERC Tariff. . . ." That tariff was specifically defined in Articles II(c) and IXB of the Power Contract as those terms of "the FERC Electric Tariff, Original Volume No. 1 of New England Power Company, filed with FERC, not in conflict with any terms of the Power Contract." The meaning of that tariff, as filed with the FERC and in effect from the date of the contract up until FERC's approval of NEP's divestiture and termination of Tariff 1 service to its affiliates in its order of February 25, 1998, was that it was a cost-of-service regulated rate. The Commission's action in that order to convert Norwood from a cost-of-service based rate to a fixed price rate clearly conflicted with the plain language of the Power Contract. In addition, NEP's subsequent filing of a stranded cost CTC designed to require Norwood to make payments for NEP to up to $78 million, even though NEP stopped providing all-requirements electric service to Norwood under NEP's FERC tariff, also conflicted with the 1983 Power Contract.

---

[8] NEP's affiliates, including Mass. Electric and Narragansett, took 97 percent of NEP's Tariff 1 service.

Norwood's new FERC-ordered fixed-rate is indistinguishable from the fixed-rate contracts held by this Court to preclude any unilateral charge filed by the utility under the FPA during their term. *Federal Power Comm'n v. Sierra Pac. Power Co.*, 350 U.S. 348, 355 (1956); *United Gas Pipeline Co. v. Mobile Gas Serv. Corp.*, 350 U.S. 322 (1956). The court of appeals below agreed that these cases establishing the *Sierra-Mobile* doctrine "prevents FERC from overriding a contract unless it finds that the contract is contrary to the public interest", and that "the addition of the express option to terminate earlier (at a specified price) can be viewed as modifying the contract." App. 12a; 202 F.3d at 400. However, the court erroneously declined to apply the *Sierra-Mobile* doctrine on the ground that the CTC was, in essence, only applying a liquidated damage clause to the contract:

> . . . The termination charge is certainly a detriment but, absent a showing that its formula is any worse than contract damages, it merely spells out what would have been the law's remedy if Norwood had no option but simply breached the existing contract.

Id.

But this turns the *Sierra-Mobile* doctrine upside down. The Power Contract contained no authorization for Norwood to make any payments to NEP when NEP was not delivering power, and included no liquidated damages clause that would apply in the event either party breached the contract. The court improperly authorizes NEP to unilaterally insert such a clause that conflicts with the Power Contract authorizing only payment for actual power service delivered by NEP. This is confirmed by Article IXB of the Power Contract stating that, "in the event of any conflict between the provisions of this Contract and the

provisions of NEP's FERC Tariff, the provisions of this Contract shall control."

Thus, the court of appeals' decision that NEP can unilaterally add a provision to the contract that, "merely spells out what would have been the law's remedy if Norwood had no option but simply breached the contract"(*i.e.*, the imposition of a liquidated damages clause), since contrary to the language of the Contract requiring Norwood to only pay for power service provided by NEP, wholly misapplies this Court's *Mobile-Sierra* doctrine.

IV. NEP's CTC Should Have Been Rejected As An Unlawful Retroactive Rate Under This Court's Decision In *Arkansas-Louisiana Gas Co. v. Hall* And For Failing To Meet FERC Regulations For New Rate Filings

NEP's stranded cost filing violates the filed rate doctrine because it changed NEP's Tariff 1 retroactively after Norwood's service ended. After NEP's divestiture, termination of Tariff 1 service to its affiliates, and conversion of Norwood's cost of service rate to a fixed price rate approved by the Commission's order of February 25, 1998, Norwood notified NEP on March 3, 1998 that it was shifting to a new power supplier effective April 1, 1998. Norwood's new contract with Northeast Utilities was filed with the FERC and unconditionally approved by it on April 22, 1998. This became the new filed rate for Norwood. NEP never requested rehearing or contested this order.

This Court in *Arkansas-Louisiana Gas Co. v. Hall*, 453 U.S. 571, 578 (1981) held that: ". . . The Commission may not impose a retroactive rate alteration and, in particular, may not

order reparations, *see, e.g., FPC v. Sunray DX Oil Co.*, 391 U.S. 9, 24 (1968). . ." This rule has been followed by a number of circuits. *Columbia Gas Transmission Corp. v. FERC*, 831 F.2d 1135, 1140 (D.C. Cir. 1987); *Electrical District No. 1 v. FERC*, 774 F.2d 490, 493 (D.C. Cir. 1985) ("The wholesale purchasers of electricity cannot plan their activities unless they know the cost of what they are receiving, . . . Providing the necessary predictability is the whole purpose of the well-established "filed rate" doctrine which forbids a regulated utility to charge rates for its services other than those properly filed with the appropriate regulatory authority"); *Town of Concord v. FERC*, 955 F.2d 67, 71 (D.C. Cir. 1991).

The court of appeals below improperly sought to distinguish these precedents on the ground that the "tariff change gives Norwood an option it did not have before to cancel future purchases on short notice by paying a termination charge – hardly a retroactive increase in charges for past purchases," App. 13a; 202 F.3d at 400-401 (emphasis in original), but this directly conflicts with the timing of NEP's CTC filing. This is completely inaccurate as Norwood had departed NEP with FERC's approval given on April 22, 1998, long before FERC's approval of NEP's CTC given on May 15, 1998. Thus, Norwood had no option available to it at the time the new contract was entered into with Northeast Utilities. In addition, NEP and the court characterized NEP's CTC as a "stranded cost recovery in the tariff."[9] Hence, the CTC, in fact, seeks to charge Norwood for prior costs incurred by NEP which it now alleges have been stranded. These costs are not new costs for the future but old prior costs which have not been collected. This was also admitted by the court below when it described NEP's CTC:

---

[9] App. 11a; 202 F.3d at 400; *see also, supra*, at 15.

> . . . It is a formula-driven charge to recover certain projected losses to New England Power caused by not supplying electricity and preparing to do so, . . .

App. 13a; 202 F.3d at 401 (emphasis added). Thus, the facts are clear that NEP's CTC filing seeks to recover prior incurred costs by NEP which that company claims it incurred because of its own voluntary and unrequested decision to depart from the electric generation business, [10] which it had not legally been authorized to collect up to the point of its departure from the business.

Since NEP's rates on file at the time Norwood entered its new service agreement on March 4, 1998 did not provide Norwood the legal notice necessary under the filed rate doctrine to the effect that Norwood would be subject to those charges, the court of appeals erred in accepting NEP's proposed amendment which violated the filed rate doctrine and the ban against retroactive changes in the rates on file with the Commission.

Conversely, if the court of appeals was somehow correct that the CTC was a "future" rate applicable to Norwood, the court then erred in not requiring NEP to follow the FERC's regulations governing any new rates under Sections 212 or 205 of the FPA in 18 C.F.R. § 35.13.

NEP's CTC sought to impose on Norwood a flat charge of $7,388,083 per year, or a total of over $78 million for power not delivered.

---

[10] *See* fn.2, *supra at 3-4.*

The Commission's regulations in 18 C.F.R. §35.13(a) require "every public utility shall file the information required by this section . . . at the time it files . . . all or part of a rate schedule to supersede, supplement, or otherwise change the provisions of a rate schedule filed by the Commission under §35.1"(emphasis added). This requires a detailed cost-of-service analysis of the new changed rate, which admittedly, NEP never filed. Under established Commission precedents, the failure to comply with the requirements of §35.13 of the Commission's regulations should have been summarily rejected by the Commission. *Southern California Edison Co. v. FERC*, 686 F.2d 43, 46-47 (D.C. Cir. 1982); *Consumer Power Co.*, 47 FERC ¶61,283 (1988), *reh'g denied*, 48 FERC ¶61,113 (1989).[11]

V. The Court Of Appeals Erred In Sustaining The FERC's Orders Refusing To Address The Merits Of Holding A Hearing On Norwood's Claims That NEP's CTC Relating To Norwood And NEP's Denial Of Standard Offer Wholesale Service Constituted Undue Discrimination In Violation Of Sections 212 and 205(b) Of The FPA

Both the FERC and the court of appeals conceded that NEP's CTC relating to Norwood was twice as high as the CTC NEP had agreed to enter with its distribution company affiliates, Mass. Electric and Narragansett. App. 15a; 202 F.3d at 401-402. Norwood timely filed affidavits by expert witnesses in the

---

[11] The court's reference in a footnote to 18 C.F.R. §35.13(a)(2)(iii) is not relevant and NEP did not meet those requirements.

FERC proceedings establishing these facts, but the matters were never discussed on the merits by the Commission in its orders below and the FERC denied any hearing on the issues. [12]

In the first case before the Commission, Norwood presented evidence through its expert, Robert G. Towers, that the stranded cost charges under the CTC agreed to by NEP with its affiliates, Mass. Electric and Narragansett, would result in the payment of stranded costs of $1.626 billion in excess of those authorized by the Commission under Order 888. Norwood also submitted the affidavit of Dr. John W. Wilson concluding that the agreement between NEP and USGen to fix prices at which USGen would sell back wholesale electric power to NEP's affiliates, would escalate by 60 percent over the seven year period 1998 to 2004 and would distort the competitive market prices. This would directly harm Norwood and would "effectively foreclose Norwood from potential competitive wholesale power market and destroy Norwood's ability to provide its own retail customers with alternative, competitive supply options." The Commission refused to hold a hearing in either case (dealing with NEP's divestiture filing under Section 203 of the FPA), despite extensive affidavits presented by Norwood.

In the third case before the Commission dealing with NEP's CTC filing relating to Norwood, the Commission again accepted NEP's filing without suspension or hearing, and

---

[12] The court of appeals cite to a ruling by the administrative law judge in the first of the three dockets before FERC (ER97-678-000) is completely irrelevant because it was in the early stage of the proceeding and Norwood legally submitted affidavits based on the subsequent contract entered by NEP with USGen transferring the standard offer service to that company, which were accepted by the Commission. App. 29a, 30a-31a; 81 FERC ¶61,281, 62,371 (1997).

offered no analysis of Norwood's expert affidavits which established that the CTC to Norwood was twice as high, nor did it offer analysis on the issue of discrimination extensively argued by Norwood in its pleadings. The Commission made no evaluation of the matter on the merits other than to state that, "unlike the CTC approved in the tariff amendment, the CTC's approved in the settlement proceeding was a product of negotiated settlement," citing *Cities of Bethany, et al. v. FERC*, 727 F.2d 1131 (D.C. Cir. 1984), *cert. denied* 469 U.S. 915. The court of appeals affirmed this as a basis for FERC's refusal to even discuss or consider the discrimination claims raised by Norwood in its affidavits. However, *Cities of Bethany* does not justify the FERC's conduct as sustained by the court of appeals in the present case for a number of reasons.

First, the FERC allowed contesting parties a hearing before a presiding administrative law judge in which all of the parties participated and the full merits of all of the factual issues were fairly investigated. 727 F.2d at 1134-5.

Second, Norwood here has alleged anticompetitive effects based on having a CTC twice as high as NEP's CTC to its affiliates, as well as denial of standard offer service. The court in *Cities of Bethany* agreed that such allegations would require the Commission to consider such claims. 727 F.2d at 1140-1141.

In the present case, Norwood did allege and present expert affidavits to the FERC that the difference in the CTC charge by Norwood in relationship to its much lower CTC charges to its affiliates, and the below market standard offer fixed prices denied to Norwood, are designed to give NEP's affiliates a competitive advantage over Norwood in a retail market in which both Norwood and NEP's affiliates compete for retail customers.

Thus, Norwood properly presented its material issues of fact through expert affidavits to the FERC which did not rule that those issues were not presented, but deemed them irrelevant.

Since the court below now agrees that the evidence is relevant, App. 16a; 202 F.3d at 402, the proper remedy is a remand to require FERC to address those factual issues under the anti-discrimination sections of the FPA.

Under long-standing FERC practice and procedure, the raising of issues of material fact is alone sufficient to require FERC to undertake procedures for their adjudication. Here, Norwood did more, by voluntarily submitting expert affidavits establishing the genuine issues of fact. The Commission never stated that Norwood had not raised disputed genuine issues of material fact on the present issues, but simply ruled that those facts were irrelevant based on its rulings. The court of appeals has ruled that the discrimination issues are relevant. The FERC has never considered these matters on their merits, ordered any paper hearing proceedings or any proceeding, nor did it consider on their merits these factual contentions, which it summarily dismissed. The court of appeals improperly treated the matter as though those full hearings had taken place.

CONCLUSION

For the foregoing reasons, the petition for a writ of *certiorari* should be granted.

Respectfully submitted,

Charles F. Wheatley, Jr.
Counsel of Record for Petitioner
Wheatley & Ranquist
34 Defense Street
Annapolis, MD 21401
(301) 261-8608
(301) 261-8699

Kenneth M. Barna
Alan K. Posner
Rubin and Rudman
50 Rowes Wharf
Boston, MA 02110

May 30, 2000